

400 KAR 1:100. General administrative hearing practice provisions relating to matters brought under KRS Chapters 146, 149, 151, 223, and 224.

RELATES TO: KRS 146.200 - 146.360, 146.990, 149.344, 149.346, 149.348, 151.182, 151.184, 151.297, 151.990, Chapters 223, 224

STATUTORY AUTHORITY: KRS 146.270, 149.344, 149.346, 151.125, 151.182, 151.184, 151.186, 151.297, 224.10-100, 224.10-410, 224.10-420, 224.10-440, 224.40-310

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 146 relating to wild rivers, KRS Chapter 149 relating to timber harvesting, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers, and KRS Chapter 224 relating generally to environmental protection authorize the cabinet to conduct administrative hearings and promulgate administrative regulations. This administrative regulation establishes procedures for conducting administrative hearings.

Section 1. Applicability. This administrative regulation shall govern the conduct by the cabinet of all administrative hearings authorized by KRS Chapter 146 relating to wild rivers, KRS Chapter 149 relating to timber harvesting, KRS Chapter 151 relating to water resources, KRS Chapter 223 relating to water plant operators and water well drillers, and KRS Chapter 224 relating generally to environmental protection, including those matters initiated by a petition for hearing filed on or before August 4, 2017. This administrative regulation governs an administrative hearing, an order, and a final determination of the cabinet.

Section 2. Location of Administrative Hearing. An administrative hearing shall be held in Frankfort at the location designated by the hearing officer unless an alternative location is agreed to by each party or authorized by KRS 224.40-310(5)(e).

Section 3. Administrative Hearing Initiated by the Cabinet. (1) Criteria for filing. The cabinet may initiate an administrative hearing and may seek a remedy identified in subsection (2) of this section if:

(a) The cabinet has reason to believe that a violation of KRS Chapters 146, 149, 151, 223, 224, KAR Titles 400, 401, 402, an administrative regulation, a permit, registration, or certification condition has occurred or is occurring; or

(b) The cabinet has reason to believe a remedy should be sought or an order should be entered against any person to protect the environment or the health and safety of the public.

(2) Remedies. In an administrative hearing initiated by the cabinet, the cabinet may seek one (1) or a combination of the following:

(a) Permit revocation, termination, denial, modification, or suspension;

(b) Bond and other financial assurance forfeiture;

(c) Civil penalty;

(d) A determination, if expressly authorized by statute, that a person shall not be eligible to receive another permit or conduct future activity;

(e) Cost recovery if expressly authorized by statute; or

(f) Any other relief to which the cabinet may be entitled by KRS Chapters 146, 149, 151, 223, 224, KAR Titles 400, 401, and 402.

(3) Procedure for an administrative hearing initiated by the cabinet.

(a) The cabinet shall initiate an administrative hearing by filing an administrative complaint with the office incorporating the following for each claim for relief:

1. A statement of facts entitling the cabinet to administrative relief;

2. A request for specific relief; and

3. A copy of any notice or order upon which relief is sought.

(b) Answer or responsive pleading.

1. The respondent shall file with the office an answer or responsive pleading within thirty (30) days of service of the administrative complaint.

2. The answer shall contain:

a.(i) A statement specifically admitting or denying the facts stated in the administrative complaint or amended administrative complaint; or

(ii) If the person is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the person shall so state and it shall have the effect of a denial;

b. Any defense to each claim for relief; and

c. Any other matter to be considered on review.

3. Failure to plead any available administrative affirmative defense in a required answer or responsive pleading may constitute a waiver of the defense, except that lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted shall not be waived by failure to assert them in a responsive pleading.

4. An allegation in a pleading to which no answer or responsive pleading is required or permitted shall be taken as denied or avoided.

5. An allegation in a pleading to which an answer or responsive pleading is required may be deemed admitted if not denied in the answer or responsive pleading.

(c) Amendment.

1. An administrative complaint may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the hearing officer upon proper motion.

2. The respondent shall have ten (10) days from the filing of an amended administrative complaint or the time remaining for filing an answer to the original complaint, whichever is longer, to file an answer or responsive pleading to the amended administrative complaint.

3. If the hearing officer grants a motion to amend the administrative complaint, the hearing officer shall set the time for an answer to be filed in the order granting the motion.

(4) Burden of proof.

(a) The cabinet shall bear the ultimate burden of persuasion.

(b) A respondent shall have the burden of persuasion to establish an affirmative defense.

(c) A respondent claiming an exemption shall have the burden of persuasion to establish qualification for the exemption.

(5) Default.

(a) If the person against whom the administrative complaint is filed fails to timely comply with a prehearing order of a hearing officer, the hearing officer may, on his own initiative or upon motion, issue an order to show cause why the person should not be deemed to have waived his right to an administrative hearing and why a report and recommended order adverse to the person shall not be referred to the secretary.

(b) If the order to show cause is not satisfied as required, the hearing officer shall recommend to the secretary the entry of a final order in conformity with the relief requested by the cabinet in its administrative complaint.

(c) If the person against whom the administrative complaint is filed fails to appear at an administrative hearing, the person shall be deemed to have waived his right to a hearing and the hearing officer shall recommend to the secretary the entry of a final order in conformity with the relief requested by the cabinet in its administrative complaint.

Section 4. Review of a Cabinet Order and Final Determination. (1) Who may file. A person who considers himself aggrieved by an order or final determination of the cabinet may file a petition for review of the order or final determination. The petition for review shall be filed pur-

suant to this section. This section also applies to a petition for review of a draft permit for construction or expansion of a waste disposal facility, made pursuant to KRS 224.40-310(6), if the expansion results in substantial additional capacity.

(2) Time for filing.

(a) A person filing a petition for review under this section shall file in the office a petition within thirty (30) days after the person has had actual notice of the order or final determination complained of, or could reasonably have had notice.

(b) The hearing officer shall not grant an extension of time for filing a petition for review.

(c) If the hearing officer, upon motion or his own initiative, finds that the person failed to timely file the petition for review in accordance with this section, the hearing officer shall issue a report recommending dismissal of the petition. The secretary shall dismiss a petition that is not filed in accordance with subsection (2)(a) of this section stating that the person waived his right to an administrative hearing.

(3) Content of the petition. The petition for review shall contain:

(a) A statement of the facts entitling the person requesting review to administrative relief;

(b) An explanation of each specific alleged error in the cabinet's determination;

(c) A request for specific relief;

(d) If the petition challenges an order or final determination on a permit, the name of the permittee and the permit number; and

(e) If the petition challenges an order or final determination other than a permit, a copy of the order or final determination sought to be reviewed.

(4) Answer or responsive pleading.

(a) The respondent shall file with the office an answer or responsive pleading within thirty (30) days of service of the petition.

(b) The answer shall contain:

1.a. A statement specifically admitting or denying the facts stated in the petition or amended petition; or

b. If the person is without knowledge or information sufficient to form a belief as to the truth of an allegation, then the person shall so state and it shall have the effect of a denial;

2. Any defense to each claim for relief; and

3. Any other matter to be considered on review.

(c) Failure to plead any available administrative affirmative defense in a required answer or responsive pleading may constitute a waiver of the defense, except that lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted shall not be waived by failure to assert them in an answer or responsive pleading.

(d) An allegation in the petition to which no answer or responsive pleading is required or permitted shall be taken as denied or avoided.

(e) An allegation in the petition to which an answer or responsive pleading is required may be deemed admitted if not denied in the answer or responsive pleading.

(5) Amended petition.

(a) A petition may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the hearing officer upon proper motion.

(b) The respondent shall have ten (10) days from the filing of an amended petition or the time remaining for filing an answer to the original petition, whichever is longer, to file an answer or responsive pleading to the amended petition.

(c) If the hearing officer grants a motion to amend the petition, the hearing officer shall set the time for an answer to be filed in the order granting the motion.

(6) Effect of filing. The filing of a petition for review shall not stay the effectiveness of the cabinet's order or final determination pending completion of administrative review.

(7) Burden of proof.

(a) The petitioner shall bear the burden of going forward to establish a prima facie case and the ultimate burden of persuasion as to the requested relief.

(b) A responding party shall have the burden of persuasion to establish an affirmative defense.

(c) A responding party claiming an exemption shall have the burden of persuasion to establish qualification for the exemption.

(8) Default.

(a) If the petitioner fails to timely comply with a prehearing order of a hearing officer, the hearing officer may, at his discretion or upon motion, issue an order to show cause why the petitioner should not be deemed to have waived the right to an administrative hearing and why the petition should not be dismissed.

(b) If the order to show cause is not satisfied as required, the hearing officer shall recommend to the secretary the entry of a final order dismissing the petition since the petitioner waived the right to an administrative hearing.

(c) If the petitioner fails to appear at an administrative hearing, the petitioner shall be deemed to have waived his right to an administrative hearing and the hearing officer shall recommend to the secretary the entry of a final order dismissing the petition since the petitioner waived the right to an administrative hearing.

Section 5. Procedure for an Order for Remedy under KRS 151.297. (1) Notice.

(a) If the secretary issues an order for remedy pursuant to KRS 151.297, the secretary shall file a copy of the order for remedy in the office.

(b) Upon the filing of an order for remedy, the office shall issue an administrative summons pursuant to 400 KAR 1:090, Section 5 and shall set the time and place for an administrative hearing. The office may schedule the administrative hearing within five (5) working days from the date the order for remedy was signed by the secretary.

(2) Response.

(a) Unless paragraph (b) of this subsection applies, the person named in the order for remedy prior to or at the administrative hearing shall file a response to the order that:

1. Specifically admits or denies the facts alleged in the order;

2. Sets forth other matters to be considered on review; and

3. Sets forth evidence, if any, that the condition or activity does not violate the provisions of KRS 151.297.

(b) In lieu of a response, the person named in the order for remedy may contact the office in writing or by other means and state that an administrative hearing is not needed, and that the person does not desire to contest the order.

(3) Hearing procedure. The administrative hearing shall be held in accordance with 400 KAR 1:090.

(4) Burden of proof. The cabinet shall have the burden of going forward to establish a prima facie case as to the propriety of the order for remedy. The person named in the order for remedy shall have the ultimate burden of persuasion that the condition or activity does not violate KRS 151.297, or that the condition or activity has been discontinued, abated or alleviated.

(5) Default. The hearing officer shall prepare a report stating that the hearing was waived and the order for remedy stands as issued if:

(a) The person named in the order for remedy notified the office that an administrative hearing is not needed; or

(b) The person failed to appear at the administrative hearing.

(6) Effect of the proceeding. The scheduling and holding of an administrative hearing pursu-

ant to this section shall not operate to terminate or stay the order for remedy or the affirmative obligations imposed on a person by the order.

Section 6. Judicial Review, Effect, and a Subsequent Proceeding. (1) Judicial review. Judicial review may be taken from a final order of the secretary to the appropriate circuit court of competent jurisdiction in accordance with KRS 151.186 or 224.10-470, as applicable.

(2) Effect of final order pending judicial review. The commencement of a proceeding for judicial review of a final order of the secretary shall not operate as a stay of a final order, unless specifically ordered by a court of competent jurisdiction.

(3) Remand from a court. If a matter is remanded from a court for a further proceeding, and to the extent the court's directive and time limitations will permit, each party shall file with the office a report recommending the procedure to be followed in order to comply with the court's order. The hearing officer shall review each report and enter a special order governing the handling of the matter remanded for a further proceeding.

Section 7. Requirement to File Written Direct Testimony and Its Use in an Administrative Proceeding Subject to KRS 224.10-440. In proceedings subject to KRS 224.10-440:

(1) In addition to the provisions of 400 KAR 1:090, Section 16(4), pertaining to the admission of written testimony, the hearing officer may require the filing of the written testimony of a witness as if on direct examination, which shall be prepared and filed in the record in advance of the formal administrative hearing.

(2) The hearing officer may require written testimony to be supplemented by additional evidence.

(3) Written testimony shall be accompanied by an affidavit of the witness verifying that the written direct testimony is a true and accurate record of the witness' testimony as if given orally, and that the answers to the questions propounded to the witness are true.

(4) Any witness whose written testimony is prefiled shall appear at the formal administrative hearing unless all parties agree to waive the appearance of the witness.

(5) At the formal administrative hearing, the witness shall again verify that the written direct testimony is a true and accurate record of the witness' testimony as if given orally and that the answers to the questions propounded to the witness are true and the witness shall be available for cross examination.

(6) If a witness fails to verify his written direct testimony or is not available for cross examination at the formal administrative hearing, the written testimony of that witness shall be excluded from the record, unless each party agrees otherwise.

(7) Written testimony shall be set forth in a "question and answer" format.

(8) If written testimony, that is based upon a separate document or writing is submitted into the record, that document or writing shall be authenticated and entered into the record as an accompanying exhibit to the written testimony.

(9) Each party shall have a reasonable opportunity prior to the formal administrative hearing to:

- (a) Object to all or portions of any written testimony and any accompanying exhibit; and
- (b) Obtain a ruling on objections to written testimony or exhibits prior to their introduction at the administrative hearing.

(10) Written testimony and accompanying exhibits shall be subject to the same standards of authentication and admissibility as all other testimony and exhibits offered in an administrative hearing.

Section 8. Administrative Proceedings Subject to KRS 224.10-440. (1) Waiver.

(a) In proceedings subject to KRS 224.10-440, if each party agrees to waive the deadline of KRS 224.10-440(3), a waiver agreement executed by each party or the party's counsel shall be filed in the office.

(b) Waiver of the KRS 224.10-440(3) deadlines shall not be subject to revocation by a party without consent of all parties and the approval of the hearing officer.

(2) Motion for extension of time.

(a) A party or hearing officer seeking an extension of the deadline for completion of the administrative hearing process set forth in KRS 224.10-440(3) shall file in the office a motion for extension that includes a proposed date certain by which the report and recommended order shall be completed.

(b) The motion for extension shall be filed forty-five (45) days prior to the deadline for the hearing officer to transmit the report and recommended order to the secretary, unless good cause is shown for not filing the motion prior to forty-five (45) days before the deadline.

(c) A party or hearing officer objecting to the extension shall file any response in opposition to the motion within seven (7) calendar days from receipt of the motion. The mail rule provisions set forth in 400 KAR 1:090, Section 4(1)(d) shall not be applicable in calculating the deadline for filing the response.

(d) Upon expiration of the time period for a motion and a response to the motion, the office shall tender the motion and any response to the secretary or the secretary's designee.

(e) The secretary or the secretary's designee shall rule on the motion within ten (10) days from expiration of the time period for filing an objection to any motion for extension. (43 Ky.R. 1902; 44 Ky.R. 71; eff. 8-4-2017.)